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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-754

CURTIS B. DANNING, as Trustee in Bankruptcy of Matador Bowl, Inc., a California corporation, Bankrupt,

Plaintiff-Appellant,

vs.

BRUNSWICK CORPORATION, a Delaware corporation, A. B. MALOUF,

Defendants-Appellees.

EMANUEL LEVY,

Plaintiff-Appellant,

vs.

BRUNSWICK CORPORATION, a Delaware corporation, A. B. MALOUF,

Defendants-Appellees.

Respondents' Brief in Opposition to Petitioners' Petition for Writ of Certiorari.

Petitioners seek a writ of certiorari to review the judgments of the United States District Court for the Central District of California as affirmed on September 18, 1972 by the United States Court of Appeals for the Ninth Circuit in these consolidated proceedings, reported at 466 F.2d 1010.

I.

PETITIONERS HAVE SHOWN NO REASON WHY CERTIORARI SHOULD BE GRANTED.

Petitioners have failed "to present with accuracy, brevity, and clearness" the questions presented for review and reasons why the writ should be granted as

required by Rule 23(4) of this Court and this is sufficient reason for denying their petition. Certainly these matters are not presented by Petitioners in a manner that is understandable to Respondents, and it is for that reason Respondents are submitting their Brief in Opposition to Petitioners' Petition for Writ of Certiorari according to their best understanding of what it is Petitioners are presenting in their petition.

Respondents' best understanding of the petition is that Petitioners give four reasons why they consider a writ of certiorari should be granted, viz.:

1. Summary judgment conflicts with decisions of this Court that summary judgments in antitrust cases are disfavored and should rarely be granted (Petition, pp. 24-30);

2. The court below allegedly "defeated" the claims of Petitioners by "a mechanical application of bankruptcy or commercial law" (Petition, pp. 30-34);

3. The court below improperly failed to consider Petitioner Levy as a "potential competitor under Section 7 of the Clayton Act" in considering his standing to sue (Petition, pp. 34-36); and

4. The decision of the court below is in conflict with "legal guidelines which this Court and the Courts of Appeal have established to govern controversies such as this one" (Petition, pp. 36-41).

These four reasons given by Petitioners why the writ should be granted will be considered *seriatum*.

A. The Fact That Summary Judgments Are Disfavored and Are Rarely Granted in Antitrust Cases Is No Reason Why Summary Judgment Was Improper in These Actions.

It is true that this Court in a number of cases has observed that summary judgments are disfavored in antitrust cases and should rarely be given. Among the cases so holding are:

Poller v. Columbia Broadcasting System, 368 U.S. 464; 82 S.Ct. 486; 7 L.Ed.2d 458 (1962);

Fortner Enterprises, Inc. v. U.S. Steel Corp., 394 U.S. 495; 89 S.Ct. 1252; 22 L. Ed.2d 495 (1969).

While it is true that summary judgments in antitrust cases are said to be disfavored, this Court has recognized that a summary judgment may be granted in a proper case. This was noted by the court below in its opinion at 466 F.2d 1010 at 1013. There the court quoted from the opinion of this Court in *First National Bank v. Cities Service Co.,* 391 U.S. 253, 290; 88 S.Ct. 1575, 1593; 20 L.Ed.2d 569 (1968), as follows:

> "While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint."

The court below correctly held that Petitioners had produced and could produce no significant probative evidence and that these were cases for the proper application of summary judgments.

B. The Petition Does Not Show Wherein the Court Below "Defeated" the Claims of Petitioners by "A Mechanical Application of Bankruptcy or Commercial Law."

While Petitioners refer to the court below as having "mechanically" applied bankruptcy and commercial law, they do not contend the court erred in so doing. They do not appear to contend that court below erred in its application of bankruptcy and commercial law to reach its conclusions that:

1. The intervention of bankruptcy at a time Matador Bowl, Inc. was heavily in arrears in its installment payments on the lease and a substantial balance remained owing on the conditional sales contracts prevented Malouf as the lessor and Brunswick as conditional vendor "from retaking their property, at least until Matador's trustee had been afforded the opportunity provided by Section 70(b) of the Bankruptcy Act to either continue the contracts in force or to relinquish them."

2. The trustee relinquished whatever interest the estate in bankruptcy had in the bowling equipment and in the bowling center premises when he failed to assume contracts between the bankrupt and Brunswick and the lease between the bankrupt and Malouf.

3. When the trustee did nothing to assume the lease and contracts and in April 1966, more than 60 days following Matador's adjudication, conducted a sale of the assets of the bankrupt, such assets "did not include the lease or the bowling equipment, because the trustee, by his inaction,

was deemed to have rejected the contracts and lease and to have relinquished whatever interest the estate had in those properties."

4. At the time of the sale "the trustee had no business to sell. He had not seen fit nor taken the steps necessary to preserve the business as an integral unit, but had allowed the major components to revert to the creditor-owners."

While Petitioners do not contend the court erred in its application of bankruptcy and commercial law, they appear to be contending in their petition that Brunswick is a monopolist because it "manufactures, sells and supplies between 5 and 40 percent of all the bowling equipment sold in the United States." For that reason, Petitioners indicate, Brunswick was obliged under the antitrust laws to accede to the trustee's demands that it turn over both the leased premises and the bowling fixtures to the person making the highest bid for the property the trustee was offering for sale. While Petitioners make this contention, they point to no principle of antitrust law that would require this. As the court below points out, once the trustee rejected the lease and the conditional sales contracts, Malouf and Brunswick were free to deal with each other or with other persons, including the Petitioners, as they saw fit, or not to deal at all, and there is nothing in the antitrust laws that "make unlawful either Malouf's choice of tenant for his property, or Brunswick's refusal to allow Levy to take over the purchase contracts on which Matador had defaulted."

Further, even if the contention of Petitioners be accepted that Brunswick's 35 to 40 percent share in the market for bowling equipment makes it a monopolist, Petitioners do not allege that they were precluded from purchasing bowling equipment through the ordinary channels of trade; their only objection is that Brunswick refused to deal with a specific property at their terms. Moreover, Brunswick's alleged monopoly was in the manufacture and marketing of bowling equipment, not in the operation of bowling centers.

C. There Is No Merit Whatever in Petitioners' Contention That the Court Below Failed to Consider Petitioner Levy as a "Potential Competitor Under Section 7 of the Clayton Act" in Considering His Standing to Sue.

The court below referred to Petitioner Emanuel Levy as "a shareholder in another Los Angeles bowling center" and noted that he sought to negotiate with Brunswick for the bowling equipment and that Brunswick rejected all of his proposals. The opinion of the court, however, makes it quite clear that the negotiations were conducted and the proposals were made by him as an individual and not on behalf of any corporation of which he was a stockholder.

In any event, the court below did not address itself to the question whether Levy had standing to sue, either as a stockholder or otherwise. So far as Levy was concerned, the court simply held that Malouf was under no obligation to lease his property to him and Brunswick's refusal to allow Levy to take over the purchase contracts on which Matador Bowl, Inc. had defaulted was not unlawful. This has nothing to do with standing to sue.

D. Petitioners Have Pointed to No Guidelines of This Court or of the Court of Appeals With Which the Decision of the Court Below Is in Conflict.

Petitioners point to four "guidelines" they allege on page 37 of their petition "govern controversies such as this one" with which the decision of the court below is in conflict.

The first of Petitioners' alleged "guidelines" is "The subject of a federal antitrust suit may involve a local operation." (Petition, p. 37). Certainly nothing in the opinion of the court below conflicts with this "guideline."

Petitioners' second alleged "guideline" is "Elimination of a single competitor by joint action is a *per se* violation." Petitioners, however, do not show how this principle is pertinent. In their discussion of this principle (Petition, p. 39), reference is made only to Brunswick's "policy regarding equipment returned to inventory" and its refusal to deal with Petitioner Levy, neither of which amounted to "joint action."

As their third "guideline," Petitioners state (Petition, p. 40) "Respondent Malouf's acquiescence in Respondent Brunswick's conduct is actionable." Nowhere do Petitioners indicate what conduct of Brunswick is referred to or what it was to which Malouf acquiesced.

Finally, as their fourth "guideline," Petitioners refer to Brunswick's conduct as being actionable "Even if Brunswick's retail market is small," as "the percentage of the market foreclosed by the vertical arrangement is not itself decisive." (Petition, p. 40). Here again Petitioners fail to indicate what conduct is referred to or to point to any vertical arrangement.

II.

CONCLUSION.

Petitioners have shown no reason as provided by Rule 19 of this Court or otherwise why their petition for writ of certiorari should be granted. Clearly the court below correctly decided these cases and Petitioners have pointed to no error. Their petition should be denied.

Respectfully submitted,

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